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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A MISSOURI CORPORATION, DAVID HALL, M.D., AND MICHAEL FREIMAN, M.D.,

Appellants,

v.

JOHN C. DANFORTH, ATTORNEY GENERAL OF THE STATE OF MISSOURI, AND J. BRENDAN RYAN, CIRCUIT ATTORNEY OF THE CITY OF ST. LOUIS,

Appellees.

No. 74-1419

JOHN C. DANFORTH, ATTORNEY GENERAL OF THE STATE OF MISSOURI,

Appellant,

v.

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Appellees.

(Continued on inside front cover)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF OF AMICUS CURIAE FOR UNITED STATES CATHOLIC CONFERENCE

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INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent Missouri constitutional and statutory provisions, the provisions of the United States Constitution involved, and the opinions of the court below are set out in the briefs filed by the appellants and the appellees. This amicus accepts them for purposes of its own brief. Both parties have consented in writing to the filing of this brief amicus curiae by the United States Catholic Conference.

INTEREST OF THE AMICUS CURIAE

I.

Identification of the Amicus

The United States Catholic Conference is a nonprofit corporation and an agency through which the Catholic

Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

II.

Interest of the Amicus in These Cases

The issues presented in these cases profoundly affect the life of the family. The authority of parents over their children and the integrity of the marital relationship are concerns which affect the very fabric of society. It is the conviction of this amicus that matters of such fundamental import require consideration from all quarters. A spirit of service to the Court prompts this amicus to submit the arguments contained herein for the Court's consideration.

There is, further, a special interest of this amicus in the constitutional argument made by the petitioners regarding political divisiveness.

SUMMARY OF THE ARGUMENT

I.

VIABILITY

A. The petitioners have proposed a definition of "viability" which is not related to the life of the fetus. The definition urged upon the Court would ignore the capacity of the fetus for viability and turn solely upon the woman's length of pregnancy. Such a definition of viability defeats the state's compelling interest in the viable fetus.

B. A definition of viability cast in terms of the length of pregnancy removes from the abortion procedure any substantial exercise of medical judgment. The empirical data used to determine viability where the pregnancy standard is used will be supplied by the woman herself. The medical expertise cited as a basis for removing abortion procedure from state control will be entirely absent under such a standard.

C. The dispute over the definition of viability springs wholly from the decision in *Roe v. Wade* where the Court abandoned a biological definition of life and substituted a consensual standard regarding the term "human". This substitution means that the definition of life will shift with popular opinion.

D. The definition of life employed by the Court in *Roe v. Wade* subjects a protected constitutional right to the workings of an extra-judicial consensus. It is the purpose of the Bill of Rights and the Fourteenth Amendment to remove certain rights from such a process.

E. The theory of penumbral rights is grounded in acceptance of causal implication as legally significant. Failure of the Court to extend the right of life to the unborn child ignores the causal connection between the fetus and the child and is contrary to the just application of the penumbral theory.

F. The Court's failure to anchor its definition of life to biology has resulted in the petitioners' claim to a further revision of that definition. This process of redefinition can be expected to continue unless the Court abandons the decision in *Roe v. Wade*. The amicus respectfully urges the Court to resecure the definition of life to biology and to extend legal personhood to the unborn as a necessary application of the Fifth Amendment protection of life.

II.

PARENTAL CONSENT

A. The right of a minor to assert a constitutional claim in contradiction to that of a parent is not specifically at issue here. The petitioners position acknowledges that the minor alone cannot make the decision. The effect of the petitioners' claim is to supplant the parent with a third party stranger.

B. The state has an affirmative duty to support parents over third parties. This court has given parental authority a primacy that is rivaled only by the state itself. Parental authority is a fundamental right which must be respected by the state.

C. Petitioners claim that minors enjoy a parity of constitutional rights with adults is not supported by

law. In point of fact, this Court has repeatedly noted the child as being in a separate constitutional category from adults.

D. The constitutional rights of parents to control their children necessitate an application of due process guarantees to the extent that these rights cannot be cut off arbitrarily.

E. The life of the family is of great moment to the fabric of society. A decision which juxtaposes parent and child must inevitably work great social harm.

III.

SPOUSAL CONSENT

A. Right of privacy argued by the petitioners is essentially a familial right and must be considered in that context.

B. Marriage and the family have historically been viewed in an organic sense. Those entities have continually been held legally significant in their own rights. Duties running to and from marriage partners have long been imposed by the operation of law.

C. The state has not only an interest of its own in the marital relationship but may legally act to protect the interest of the marriage partner in that relationship. The interest of those partners has been deemed fundamental and consequently the state is under a special duty to support those rights.

D. The right to progeny has been deemed to exist to each partner in the marriage relationship. Further, that right has been seen as fundamental. Consequently, the state may lawfully legislate to effect protection of those fundamental interests.

IV.

The doctrine of political divisiveness is objectionable to the associational freedoms secured in the penumbra of the First Amendment. The amicus urges the Court to publicly disavow that doctrine.

ARGUMENT

I.

VIABILITY

INTRODUCTION

The Court in *Roe v. Wade*[1] held that certain forms of human life would not be protected by law. Here, the petitioners urge this Court to further reshape the boundaries of protected human life and thereby relieve them of important duties imposed by law. The issue of viability is wholly a product of the decision in *Roe v. Wade*, and the controversy presented here had its roots in that ruling. The petitioners ask the Court to refashion anew the concept of life. This amicus respectfully asks the Court to reject the petitioners' challenge and to abandon *Roe v. Wade*.

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[1] Roe v. Wade, 410 U.S. 113 (1973).

A. PETITIONERS' PROPOSED DEFINITION OF VIABILITY IS NOT RELATED TO FETAL LIFE AND WOULD THEREFORE DEFEAT THE COMPELLING STATE INTEREST IN THE VIABLE FETUS.

The petitioners argue that the definition of viability contained in H.B. No. 1211 Section 2(2) is constitutionally impermissible. Further, they urge that viability be defined as a stage of pregnancy rather than as an attribute of the unborn child. A fair reading of the petitioners' argument indicates that the sole ground upon which they base their constitutional claim is the position that *Roe v. Wade* has required compelling state interest in prenatal life to comport with the stages of pregnancy rather than with the condition of the fetus.

The petitioners cite *Hodgson v. Anderson*,[2] *Doe v. Rampton*,[3] and *Planned Parenthood Association v. Fitzpatrick*[4] as requiring such a reading of *Roe v. Wade*.

As additional support for their position, the petitioners rely upon *Wolfe v. Schroering*. 388 F. Supp. 631. This reliance is misplaced, since that court said:

> "The court did not use the term 'third trimester' . . . The decision then is whether the decision (*Roe v. Wade*) flatly holds that viability occurs no sooner than 24 weeks and thus the state's interest is not compelling until then. We

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[2] Hodgson, et al. v. Anderson et al., 378 F. Supp. 1008 (D. Minn. 1974), appeal dismissed sub nom Spannaus et al., v. Hodgson et al., 420 U.S. 903 (1975).

[3] Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

[4] Planned Parenthood Association, et al, v. Fitzpatrick, et al., ____ F. Supp. ____ (E.D. Pa.(1975).

> think not. Viability is a condition in which the fetus 'presumably has the capability of meaningful life outside the mother's womb (Roe v. Wade, 410 U.S. at 163). Because the point at which viability may be ascertained varies, the state's interest in preserving the fetus also varies as to the time it becomes compelling." *Wolfe v. Schroering* 388 F. Sup 631 (W.D. Ky., 1974) at page 636.[5]

The court below has held that compelling state interest in viability is not bound by any trimester but rather attaches as the circumstance of each case requires and is viewed as an attribute of the fetus.

> "We do not think it is properly the function of the legislature or the courts to fix viability at an inflexible point in gestation. The time when viability is achieved will vary with each pregnancy, and the determination of whether a fetus is viable in a particular case must be left to the attending physician. Section 2(2) has precisely this effect."[6]

The petitioners' basic complaint, as we understand it, is that the medical judgments involved in determining viability are quite difficult. There is, however, no indication that the medical personnel do not understand what is required of them; consequently, the statute cannot be challenged for vagueness.

This Court is asked to refuse protection of law to a viable fetus which has not yet reached the 24th week of gestation. Pregnancy is, of course, a condition of the woman and is unrelated to those fetal attributes which determine its viability. To consider viability in terms of a condition of the woman is to establish a standard which is not connected with fetal development.

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[5] Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974) at p. 636.

[6] Planned Parenthood of Central Missouri, et al., v. Danforth, et al., 392 F. Supp. 1362 (E.D. Mo. 1975), enforcement stayed and enjoined 420 U.S. 918 (1975).

B. DEFINING VIABILITY IN TERMS OF PREGNANCY REMOVES MEDICAL JUDGMENT FROM DOCTOR'S PROVINCE.

Crucial to the *ratio decidendi* employed by the Court in the decision which removed the abortion procedure from state control was the ground that such a procedure involved the exercise of medical judgment. The Court found physicians entitled to immunity from state prosecution because of the necessity to make medically responsible judgments. The petitioners now ask this Court to free medical personnel ~~from~~ that very judgmental factor which contributed to the granting of immunity in the first instance. The petitioners' case is then the second step in a process in which, first, immunity is granted to physicians because of the requirements for their exercise of medical judgment; secondly, the requirement to make medical judgments is removed, leaving only the bare procedure and immunity therefrom.

According to the petitioners' view, a pregnant woman would report the date of her last menstrual period and this report would fix the viability of the fetus. Any layman able to use a calendar would be able to judge viability.

The insistence that viability cannot date prior to the end of the second trimester of pregnancy is to make the calendar the measure of viability rather than the actual condition of the unborn child. Such a criterion calls into question the object of the state's compelling interest. If the object of that compelling state interest is the protection of the life of a fetus capable of living outside the womb, then that interest would be defeated by the use of an arbitrary measure, such as a calendar date.

C. PRESENT CONTROVERSY IS A PRODUCT OF THE DECISION IN *ROE V. WADE* TO ABANDON A BIOLOGICAL DEFINITION OF LIFE AND THE SUBSTITUTION OF "SOCIOLOGIC" STANDARDS.

The issue of viability and the petitioners' challenge to Missouri Bill 1211 are products of *Roe v. Wade* and can only be understood as such. That decision is marked by many inner tensions and inconsistencies but nowhere is that tension or inconsistency greater than in the Court's view of unborn life. The dynamic which shapes the present controversy flows directly to the Court's treatment of prenatal life in *Roe v. Wade.*

The principal source of difficulty is that the Court in *Roe v. Wade* created the category of "potential life". This is a distinction which does not exist biologically. The human fetus is, according to all life science, a human life from the onset of conception. Biologically, it is not potential human life; it is actual human life in its earliest form. The human fetus is unquestionably alive; it cannot be characterized as anything less than human. *Byrn v. New York City Hospital,* 42 N.Y. 2d 194-199 (1972).

The Court's use of the expression "potential human life" indicates a rejection of biological criteria. That rejection ignores the causal link of the fetus of the unborn to the born. Without any explanation, the Court has deemed the fetus as merely being prior in time to a child. Such a view is reminiscent of Collingwood's observation regarding John Stuart Mill's theory of causality:

> "If you cut out the category of cause . . . you are cutting out the idea of necessary connection and

> trying to content yourself with the mere human succession, that is, you are attaching cause to empiricism such as John Stuart Mill for whom a cause simply is an antecedent and for whom consequently all knowledge is observation of fact devoid of any apprehension of necessity."[7]

The Court's treatment of fetal life is very much in line with Mill's view of cause. The decision in *Roe v. Wade* is absent of any recognition of biological connection between unborn and born. There is no recognition of the necessary or causal connection of one to the other.

The Court's rejection of biology as a criterion is accompanied by substitution of what might be termed a sociological or normative definition of "human". This substitution is crucial as it provides the rationale of the entire holding. Fetal life can only be "potential" human life if one accepts a view that human biologic life is insufficient to be "human". Thus, the decision in *Roe v. Wade* is saved from irrationality by the recognition of a definition of human life that rejects life science and recognizes as life only that which the societal consensus can agree is human.

The Court's reference to the indecision of various segments of our society as to the beginning of human life does not reflect any confusion in the life science community. There, the consensus is uniform that the fetus is a human being, a member of the human species which is living. The confusion spoken of by the Court lies with the application of descriptions which various groups utilize to establish norms for the recognition of other groups. It is, we submit, far from clear what

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[7]R. G. Collingwood, *The Idea of Nature*, Oxford University Press (1945), reprint 1970, p. 163.

probitive value can be attached to the exaltation of a mere description of behavior over the biologic criterion.

D. DEFINITION OF LIFE SUBJECT TO SOCIOLOGIC CONSENSUS CONTRARY TO PROVISIONS OF THE BILL OF RIGHTS AND FOURTEENTH AMENDMENT.

The Court's use of normative definitions of "human" must be considered in light of one of the aspects of real genius of the United States Constitution. That document removes certain civil rights from the workings of the popular will. Control over certain matters is taken from the various branches of the United States government and from the states by the Bill of Rights and the Fourteenth Amendment respectively. Chief among these civil rights is the right to life, which must not be taken away without due process of law. The right to take a life must, under our constitutional system, be a public right exercised under the most rigid controls of due process. Furthermore, the right is fixed in the Constitution and may not be altered by popular consensus, legislatively manifested or otherwise. Thus, a statute which repealed homicide laws would be unconstitutional since it would remove the protection of life from the public sector and locate it in the private sector. Authority for such laws is not founded on any sociological data relating to homicide. Rather, it springs from the constitutional protection of life.

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish

them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[8]

The effect of the decisions in *Roe v. Wade* and *Doe v. Bolton* is to endanger civil rights in precisely the way the Constitution was designed to prevent. Those decisions subordinate a protected right to the caprice of societal evaluation. Constitutional guarantees of due process are removed and made subject to an extra-legal system or normative rather than biologic fact. The popularity of a given norm will govern its applicability to the law. *Roe v. Wade* uniquely opens a protected constitutional right to the workings of the popular will.

It is human life that is guaranteed by the Constitution, not "the quality of it". The determination of "quality" is inherently subjective and affords the overwhelming discretionary authority which has been condemned by this Court in many other instances.[9]

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[8]West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

[9]Discretion of this type frequently yields to the bias of the subject. This problem is well evidenced by the recent action of the American Congress of Obstetricians and Gynecologists. That body refused to enclose a brief amicus curiae in the appeal of the case involving Dr. Kenneth Edelin because "the express statement of an adversary relationship to the fetus is not consonant with the traditional role of the fellows of the college." These doctors treat two patients when they deal with a pregnant woman and do not want to be compelled to prefer one over the other. Ob. Gyn. News, Dec. 15, 1975.

The *Roe-Doe* majority has acted to alter the substance of the constitutional guarantees to life by way of a redefinition of the term "human" to restrict that term to those able to pass the muster of "meaningful" life. The Court's rejection of the traditional biological criterion has significantly altered the Fifth Amendment guarantees to a point where more than biologic life is required to invoke them. The Court's use of the ambivalent and universally subjective term "meaningful" must excite speculation as to how much more might be required to invoke these guarantees. In any event, it is clear that all protected life, after born included, is now subject to the inchoate consensus among undefined groups as to what is "human".[10]

E. FAILURE OF THE COURT TO EXTEND LEGAL RIGHTS TO THE UNBORN CHILD IS CONTRARY TO THE JUST APPLICATION OF PENUMBRAL THEORY.

Coincidental with the Court's rejection of a biologic criterion for human life, the majority in *Roe v. Wade* found that the unborn child lacks legal personhood. The language of the petitioners' brief indicates that the rejection of legal personhood flowed from recognition of the absence of the necessary "human" attributes. Such a position ignores the fact that the category of legal personhood is not coeval with any "human" characteristics. Legal personhood is and has for some

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[10]Roe v. Wade, *supra*, p. 159.

time been recognized in respect to objects such as ships and corporations.

> "The world of the lawyer is peopled with inanimate right-holders; trusts, corporations, joint ventures, municipalities, Subchapter R partnerships, and nation-states, to mention just a few. Ships, still referred to by the courts in the feminine gender, have long had an independent jural life, often with striking consequences. We have become so accustomed to the idea of a corporation having 'its' own rights, and being a 'person' and citizen for so many statutory and constitutional purposes, that we forget how jarring the notion was to early jurists. 'That invisible, intangible and artificial being, that mere legal entity' Chief Justice Marshall wrote of the corporation in *Bank of the United States v. Deveau*—could a suit be brought in *its* name? Ten years later, in the Dartmouth College case, he was still refusing to let pass unnoticed the wonder of an entity 'existing only in contemplation of law'."[11]

The granting of legal personhood in such instances is, we submit, properly the product of a constitutional analysis which recognizes the existence of rights which must be said to be implicit in other, more explicitly protected rights. That process of analysis which found these rights residing in the penumbra of others operates on acceptance of a causality which recognizes the force of a necessary implication. The right to property guaranteed in the Constitution carries with it the implication that the causal connection between a business organization and the contractual relationships

[11]Stone, Christopher, *Should Trees Have Standing*, Kaufman 1972, p. 5.

that flow therefrom imply a legal significance great enough to provide that "invisible, intangible, and artificial being"[12] with legal personhood.

Recognition of the legal significance of such causal implication is not limited to personification of business organizations. The process used to reach the penumbral rights enunciated in *Griswold v. Connecticut*[13] is the self-same recognition of necessary implication. Penumbral rights are, quite simply, those rights which must be recognized because they are necessarily implied in an explicitly protected right.

The penumbral process which recognized rights such as those found in *Maynard v. Hill*,[14] *Meyer v. Nebraska*,[15] *Pierce v. Society of Sisters*,[16] and *Griswold v. Connecticut*,[17] as well as those found in *Loving v. Virginia*,[18] *Skinner v. Oklahoma*[19] was rejected by the majority in *Roe v. Wade* when it refused to protect fetal life, even though such life is a necessary, not coincidentally antecedent, connection to the lives of all those "persons" protected by explicit direction of the Constitution.

There is irony in the fact that the majority in *Roe* not only failed to use the penumbral process with

[12]*Ibid.*, p. 5.

[13]Griswold v. Connecticut, 381 U.S. 479 (1965).

[14]Maynard v. Hill, 125 U.S. 190 (1888).

[15]Meyer v. Nebraska, 262 U.S. 390 (1923).

[16]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[17]Griswold, *supra*, n. 13.

[18]Loving v. Virginia, 388 U.S. 1 (1967).

[19]Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942).

respect to fetal life, but also misapplied it with respect to the pregnant woman. The right to life is explicitly protected in the Fifth and Fourteenth Amendments and the existence of fetal life is necessarily implied in that protected right. A fetus is not a "different being" from a human being. Every human being born is the "same being" at a different state of development from his/her fetal stage. Our continuous existence is not dependent upon normative standards – our existence is assured at the biologic level by the same kinds of internal stimuli and reactions throughout our temporal development. The human element cannot be divorced from *zöos*. There can be no "human" life without human fetal life.

The Mill-like view of the causal relationships between the unborn child and the born adopted by the *Roe* majority and the Court's concommitant rejection of the biologic criterion of life are also accompanied by a rejection of the penumbral process which would lead to the recognition of legal personhood. Can it be said that the liberty of the Fifth and Fourteenth Amendments *necessarily* implies a right to abortion? Implication, it should be noted, is not the same as inference. A thing is implied because of the logical necessity, which may not be perceived, that it be so. Is there really a necessity that liberty encompass a private right to end the life of a human fetus.

F. PETITIONERS' CHALLENGE TO VIABILITY OR AS AN ATTRIBUTE OF FETUS CONSTITUTES A SHIFT IN CONCEPTION OF PROTECTED LIFE. UNLESS THE COURT ABANDONS ROE V. WADE IT MUST CONTINUE TO REDEFINE LIFE.

From the foregoing it is clear that the concept of viability as enunciated in the decision of *Roe v. Wade* is at once a confirmation and a denial of the human existence of the unborn child. It is a fundamental contradiction.[20] The rejection of the necessary relation of fetus to child has placed the Court in an ambiguous posture in its stand regarding "potential life".

The Court in *Roe v. Wade* made a good faith attempt to perceive the societal or normative consensus regarding the quality of life to be recognized as human. The majority there acted on the perception that a viable fetus would be accepted as "human" enough to warrant state protection of that life.

The position espoused by the petitioners herein represents at once both a shift away from the view of "human" perceived by the Court in *Roe* and *Doe* and

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[20]The Federal Rules of Evidence require, pursuant to Rule 201, that only adjudicative facts which are indisputable may be subject for judicial notice. While the federal rules were not in force at the time of the ruling, the doctrine which they express regarding judicial notice was well established. It is quite difficult to view the *Roe* decision as not having an adjudicative quality, as that holding relates to fetal life. Curiously, the judicial notice of legislative facts has limited the ability of the "disputed" facts regarding fetal life to be an adjudicative concern. See Davis, *Judicial Notice*, 55 Col. L. Rev. 945, 952 (1955).

also is an example of the danger of allowing protection of human life to become a matter for societal definition. The Court's perception of the acceptability of a viable fetus as human has been rejected by the petitioners. That very act of rejection should be sufficient to alarm the Court to the danger to constitutional guarantees posed by the rulings of *Roe* and *Doe*.

The Court's definition of life is not anchored to biology. It is likely therefore that the abandonment of biological life as a criterion of Fifth Amendment protection will continue in the future to subject the Court to numerous redefinitions of the term "human".

Further, it should be obvious that the use of the normative mechanism to determine the definition of "human" will not be limited to the fetus. In point of fact, redefinition of that term is already under way, respecting both ends of the life process. Already there are indications that some see children afflicted by Tay-Sachs Disease or Downs Syndrome as, perhaps, not falling within the consensus of "human".

In summary, we urge the Court to accept the Fifth Amendment and Fourteenth Amendment as removing the right to life from the working of any societal consensus. Further, we urge the Court to recognize and accept the necessary implication which prenatal life has for all life, and to extend legal personhood to the unborn as a necessary implication of the Fifth Amendment protection of life.

II.

PARENTAL CONSENT

A. MINOR'S RIGHTS NOT AN ISSUE. PETITIONER SEEKS TO SUPPLANT PARENT WITH THIRD PARTY.

The record in this case indicates that the abortion clinics involved here routinely maintain counselling sessions which take place before the abortion procedure. The stated purpose of these sessions when a minor is involved would include, *inter alia*, a determination of the intelligence and maturity of that minor. Testimony for the petitioners indicates that not all minors can be considered capable of giving informed consent.[21] There is evidence in the record that the clinic would not go forward unless one of its employees was satisfied that the minor was sufficiently mature to make the requisite decision.

> "Q. In the event that an unmarried minor patient under the age of eighteen could not obtain parental consent for the reason that neither parent was available, such an an orphan, would you still require the consent of a person standing in loco parentis?
>
> A. Yes.
>
> Q. In the event that one could legally give her own consent, would you require the consent of one parent?
>
> A. It would not be required. It would be handled on an individual basis.

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[21] Testimony of Judith Widdicombe on direct examination p. 164 of the Record.

Q. What would be the factors of *your* determination?

A. A number of factors, the girl's maturity, the level of decision making, her ability to carry through with the procedure, any extenuating circumstances that might exist.

Q. Would her education be a determining factor?

A. Possibly.

Q. Her intelligence?

A. Yes.

Q. In summation, would it be fair to say that *you* would base each individual case on its own merits using all these factors to *determine* whether or not the consent she was giving was informed?

A. Correct." (emphasis supplied)[22]

It is clear, then, that an abortion clinic employee not the minor herself will make the determination as to whether or not the child in question is sufficiently mature and intelligent to perceive the implications of her actions. The petitioners have urged that this Court must, by force of law, remove the parents from making that determination and replace those parents with a stranger.

Although the petitioners claim to advance the right of minors to make the abortion decision, the effect of the petitioners' argument is to substitute the abortion counsellor for the child's parents. The sweeping libertarian language employed boils down to the position that the lifelong intimacy of the parent-child relationship ought to be thrown over for forty minutes

[22]Direct testimony of Judith Widdicombe on direct examination, p. 152-153 of the Record.

of counselling by a stranger, a stranger who in fact has an *economic* and *ideologic* interest in the decision in question.[23]

According to the petitioners' view, the presumption of incompetency by minority must be replaced with a presumption of competency subject to the discretion of the clinical personnel. This amicus must submit that the legislature of the state of Missouri has a constitutional right to select who is going to make the quasi-judicial decision of competency and secondly that the state of Missouri has a duty to prefer the parent over a stranger.

The petitioners do not even challenge the authority of the state to determine competency. The state has long exercised the power to define incompetency, as well as the qualifications of those permitted to act for the incompetent. See 475.055 VAMS. There is no rationale offered by the petitioners to suggest a constitutional theory which would make a stranger more suitable a judge of competency than the parents.

There is, on the other hand, a long history of rulings by the Supreme Court which outline the duties of the state to the parent. These cases leave little doubt that the state has a duty to support the parent over all others. Yet the substance of the petitioners' demand is that the legislative placement of this decision making in the parents rather than in some stranger is constitutionally impermissible.

Throughout its history the Superme Court has repeatedly confirmed the primacy of parental control of

[23]Nathanson, B., M.D., former director of a large abortion clinic, has noted that the counseling function fell to "narrow partisanship of committed young women who have had abortions and who typically staff the counselor ranks of hospitals and clinics now". 291 New England Journal of Medicine 1189 (Nov. 1974).

the family unit. The state's relationship with the parents is governed by cases in the line of *Meyer v. Nebraska*[24] and *Pierce v. Sisters,*[25] including among others *Ginsberg v. New York*[26] and *Wisconsin v. Yoder.*[27] These cases place the interest of the parents in the rearing of their children in priority to state interest. In *Pierce v. Sisters, Meyer v. Nebraska,* and *Wisconsin v. Yoder,* the Court affirmed the responsibilities naturally placed upon the parents for the support, rearing and nurturing of their children and recognized that those responsibilities carry with them an inherently requisite authority. The rights of parents to the exercise of their authority is considered fundamental and only a compelling interest by the state can overcome it. *Wisconsin v. Yoder.*

> "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[28]

The petitioners have not suggested what state interest is served by the state's substitution of a third party for the parents in the decision-making process. There is, we suggest, no constitutionally permissible ground for the state to make such a substitution. Further, the novel claim that the practice of medicine, though a privilege

[24]Meyer v. Nebraska, *supra,* n. 15.

[25]Pierce v. Society of Sisters, *supra,* n. 16.

[26]Ginsberg v. New York, 390 U.S. 629 (1968).

[27]Wisconsin v. Yoder, 406 U.S. 205 (1972) .

[28]Ibid, p. 232.

licensed by the state, is an activity protected by the First Amendment is insufficient to alter the state's responsibility to the parents. The petitioners' position is analogous to claims advanced in *Mercer v. Michigan*;[29] where parental authority over children was attacked by a school teacher seeking to substitute his rights for those of the parents. The decision in the three-judge court rejected *inter alia* the claim that parental authority could be overruled by third party rights. This holding was affirmed upon appeal to the Supreme Court.[30]

B. STATE HAS AFFIRMATIVE DUTY TO SUPPORT COURTS

Beyond the state's interest in the determination of incompetency lies the policy consideration which grounds the state's interest in preserving parental authority. *Meyer v. Nebraska*[31], *Pierce v. Society of Sisters*[32], *Wisconsin v. Yoder*[33], *Griswold v. Connecticut*[34], *Loving v. Virginia*[35], *Skinner v. Oklahoma*[36], and *Boddie v. Connecticut*[37], all accept what can only be

[29]Mercer v. Michigan, 379 F. Supp. 580 (E.D. Mich. 1974), affirmed 419 U.S. 1081 (1974).

[30]Ibid.

[31]Meyer v. Nebraska, *supra,* n. 15.

[32]Pierce v. Society of Sisters, *supra,* n. 16.

[33]Wisconsin v. Yoder, *supra,* n. 27.

[34]Griswold v. Connecticut, *supra,* n. 13.

[35]Loving v. Virginia, *supra,* n. 18.

[36]Skinner v. Oklahoma, *supra,* n. 19.

[37]Boddie v. Connecticut, 301 U.S. 371 (1971).

described as an organic view of the family and social relationships attendant thereto. These cases accept, as a premise, the view that the family is something more than the sum of its aggregate members. Within this, tradition, the cases of *Pierce v. Society of Sisters*, *Meyer v. Nebraska*, and *Wisconsin v. Yoder*, not only confirm the Court's recognition of the organic view of the family but also the state's need and, in fact, duty to give protection and support to the familial undertaking. Though the Court has traditionally treated marriage and family as being coeval, the organic view remains. A more strict view of the organic conception of society is manifested by *Stanley v. Illinois*[38]. That decision is witness to the fact that the state's obligation to the family extends to *de facto* as well as *de jure* families. The significance of this view of the family is evident in the remarks of Justice McReynolds in *Pierce v. Society of Sisters:*

> "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[39]

Set over and against this organic view of the family is an individualistic or contractarian view of familial relations argued by the petitioners and found in *Eisenstadt v. Baird*[40]. In our judgment, it is aberrational and eschews the entire history of the family before the Court.

Seven justices participated in the *Eisenstadt* decision, six supported the holding. Of that six, three justices

[38]Stanley v. Illinois, 405 U.S. 645 (1972).

[39]Pierce v. Society of Sisters, *supra* n. 16 at p. 573.

[40]Eisenstadt v. Baird, 405 U.S. 438 (1972).

concurred in the opinion for the majority, one concurred specially and two concurred only in the result. The language describing marriage did not directly relate to the holding and in view of the fact that only three of the justices concurred in that language, it is clear that the *Eisenstadt* decision cannot be considered authority to set against the weight of the many cases which deal with marriage and the family in the organic sense.

In order to adopt such a view of society, it is necessary for one to ignore the interactions of family members and causalities which affect each family member. The individual much exalted in the *Eisenstadt* opinion does not exist in our society and never has. Such an individual is an abstraction. She has no kith nor kin, she comes from nowhere, her life is not affected by her past and she has no future. She exists only in an eternal present. It is a descriptive view of the relationship rather than a dynamic view, just as the relationship between the unborn child and the post-natal child has been viewed.

The rule of *Meyer v. Nebraska*[41], did more than establish constitutional recognition of parental control of children. It also rejected a view of the family as individual integers:

> "For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:
>
> "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. * * * The proper officers will take the offspring of the good parents to the

[41]Meyer v. Nebraska, *supra* n. 15.

pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institution rest."[42]

Judge McReynolds further notes:

"... it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution."[43]

C. MINORS' LEGITIMATELY SEPARATE CONSTITUTIONAL CATEGORY. PETITIONERS' CLAIM OF PARITY NOT SUPPORTED BY LAW.

The weight of the cases affirming both an organic view of the family and the primacy of parental authority is matched by the precedental support of the concept that adults are a separate constitutional category apart from minors. The petitioners argue that children have constitutional rights coeval with adults. This parity of constitutional rights which the petitioners suggest is the law of the land does not, in our opinion,

[42]Meyer v. Nebraska, *supra* n. 15 at 627.

[43]Ibid, p. 628.

exist. The line of cases which purportedly uphold this view, such as *In re Gault*[44], *In re Winship*[45], *Goss v. Lopez*[46], and *Wood v. Strickland*[47], are essentially Due Process clause cases and deal with the issue of whether or not children are entitled to the basic fairness embodied in the concepts of due process. Such a position is far from that proposed by the petitioners. In *Ginsberg v. New York*, the Court clearly indicated the view that minors are to be considered in a different constitutional category than adults.

"That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults * * *.'" *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170, 64 S. Ct. 438, 444, 88 L. Ed. 645.[48]

This Court has never ruled that all constitutional rights of adults are available to minors. In point of fact, *McKeiver v. Pennsylvania* clearly illustrates the principle of distinction which the Court has utilized in dealing with minors.

"The Court, however, has not yet said that *all* rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceeding."[49]

[44]In re Gault, 387 U.S. 1 (1967).

[45]In re Winship, 397 U.S. 358 (1970).

[46]Goss v. Lopez, 419 U.S. 565 (1975).

[47]Wood v. Strickland, 420 U.S. 308 (1975).

[48]Ginsberg v. New York, *supra*, n. 26.

[49]McKiever v. Pennsylvania, 403 U.S. 528 (1971).

Thus, it should be obvious that petitioners' assertion of a parity of minors "rights" with those of adults is without precedental support. More specifically the Court has never said that children have rights which may be juxtaposed to those of their parents.

It follows that the organic view of the family supported by the Court's historical treatment of that institution requires that parental authority be favored over the wishes of minors. In point of fact the most dire circumstances have been required before the Court would remove the parents from control of their children. The blood transfusion cases are manifest of the extent of judicial support of parental authority. Such cases also stand for the proposition that abuse limits every right, no matter how favored in law[50] .

D. THE EXISTENCE OF THE CONSTITUTIONALLY PROTECTED RIGHTS OF PARENTS NECESSITATES APPLICATION OF DUE PROCESS GUARANTEES.

We should also note that the *Meyer v. Nebraska*[51] line of cases, in addition to the limitation upon the state's action against parental rights in a substantive sense, is also significant as a recognition by the state of the existence of parental rights. Thus, the constitutional guarantees of due process which require a hearing before any substantial interest is cut off are an element to be considered.

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[50]Jones v. President and Directors of Georgetown College, Inc., 331 F.2d 1000 (1964), cert. denied 377 U.S. 978 (1964).

[51]Meyer v. Nebraska, *supra* n. 15.

Fuentes v. Shevin holds that the presence of constitutionality cognizable rights necessitates a hearing before these can be cut off.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' "[52]

The rights of parents to state support of their role has been deemed fundamental and cannot be overturned without a compelling state interest. See *Wisconsin v. Yoder*[53]. Thus, it is impossible to reconcile the petitioners' argument with the requirements of due process. The petitioners would have parental rights universally disregarded without so much as a hearing. It is remarkable that the petitioners' arguments relating to Section 7 of Bill 1211 do not have any relevance to the argument made in regard to Section 3, Subsection 4.

The argument made by petitioners with respect to Section 7 challenges the constitutionality of termination of parental rights where a fetus has survived an abortion. The petitioners urge the Court to the view that the fact that the putative parents made an intentional attempt on the life of the yet unborn child is not in and of itself sufficient to warrant termination of parental rights. The petitioners urge the Court that parental rights are of such magnitude that the state must hold a hearing to resolve the question. How is it possible for these rights, which the petitioners see as being too great as to require such a macabre turn of events, to be universally cut off without any hearing?

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[52]Fuentes v. Shevin, 407 U.S. 67 (1972).

[53]Wisconsin v. Yoder, *supra* n. 27.

The position of the state is, we submit, more than one of neutrality. The state has an affirmative duty to support those constitutional rights which have been recognized to reside in the parents. The state cannot at once recognize the duties, responsibilities and rights of parents as fundamental and at the same time deny a parent any protection to those rights by way of due process.

III.

SPOUSAL CONSENT

A. RIGHT OF PRIVACY IS ESSENTIALLY A FAMILIAL RIGHT

A resolution of the issues presented by petitioners' challenge to the spousal consent provision of Section (3)(3) of the Missouri statute must ultimately turn on the Court's view of the nature of the institution of marriage. In the words of Justice Appleton, in *Maynard v. Hill:*

> "It is not then a contract within the meaning of the clause of the constitution which prohibits the impairing of the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress."[54]

[54]Maynard v. Hill, *supra*, n. 14 at p. 730.

Petitioner has argued that control over pregnancy resides solely in the woman and that the requirement for consent of the spouse would be constitutionally impermissible and an intrusion upon the woman's right of privacy. The proposition advanced by the petitioners, that the right of privacy is individualistic in nature, eschews the entire history of that penumbral right.

The court noted in *Paris Adult Theatre I v. Slaton,* 413 U.S.44, p.66, n.13: "the right is functionally related to family, marriage, motherhood, procreation and child-rearing." It is significant that the cases leading to *Griswold v. Connecticut*[55] and cited therein as authority are the same ones that support the organic view of the family, e.g. *Meyer v. Nebraska,*[56] *Pierce v. Society of Sisters.*[57] Thus the court's doctrine of privacy flows from a theory of the special nature of the family. According to the petitioners' view family is simply an aggregate of its members and marriage a bare contract. Thus we are faced with a situation where once having arrived at a doctrine of privacy *through* the legal protection of the family, the Court is now asked to "pull up the ladder" and utilize familial privacy to arrive at a doctrine of complete individual autonomy in familial affairs. The petitioners seek to cut away the root of the right of privacy. One might ask what remains of the doctrine of privacy after the concept of the organic marital and familial relationships are discarded – obviously, only a bare shell. The effect of removing the husband by force of law from any significant decision affecting the marriage is to take

[55]Griswold v. Connecticut, *supra*, n. 13.

[56]Meyer v. Nebraska, *supra*, n. 15.

[57]Pierce v. Society of Sisters, *supra* n. 16.

control of that decisional process from the private sector and place it in the public sector. The object of that section of the Missouri statute is to keep the decision-making process within the family.

B. MARRIAGE HAS BEEN VIEWED AS A LEGALLY SIGNIFICANT ENTITY, RATHER THAN A MERE ASSOCIATION

The Supreme Court has, throughout its history viewed marriage as something other than a mere association of individuals. In *Maynard v. Hill*, Justice Field stated:

> "It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, it is the foundation of the family and of society, without which there would be neither civilization nor progress."[58]

[58]Maynard v. Hill, *supra*, n. 14, p. 729.

The relationship between the marriage partners has, in the eyes of the law, a significance all its own. Once the parties freely enter that relationship, they take upon themselves duties which do not bind single people. Further, the state has an interest in that relationship itself. The relationship is, according to Mr. Justice Story's view:

> ". . . something more than a mere contract. It is rather to be deemed an institution of society founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts. *Maynard v. Hill.*[59]

This social institution is one of signal import which the state has a duty to protect and strengthen. (See *Skinner v. Oklahoma, Loving v. Virginia.*)[60] Further, the constitutional authority of the state to act to strengthen the family is well settled. In *Labine v. Vincent*, 401 U.S. 532 (1970) the court noted:

> "The power to make rules to establish, protect and strengthen family life . . . is committed by the Constitution to the legislature of . . . (the) State . . . . It is for that legislature, not the life-tenured judges of this Court, to select from many possible laws." (See also *Williams v. N. Carolina.*)[61]

[59]*Ibid.*, p. 731.

[60]Skinner v. Oklahoma, *supra*, n. 19; Loving v. Virginia, *supra*, n. 18.

[61]Labine v. Vincent, 401 U.S. 532 (1971) at p. 539-40; Williams v. North Carolina, 317 U.S. 287 (1942).

C. STATE HAS AUTHORITY TO PROTECT INTEREST OF MARRIAGE PARTNERS IN THAT RELATIONSHIP

Beyond the Court's recognition of the organic nature of marriage, and the state's interest in that institution lies the import which that state has for the partners themselves. The right to marry and the right to procreate have both been held to be fundamental personal rights. (*Skinner v. Oklahoma*). The whole fabric of domestic relation law is witness to the rights which each marriage partner has in the relationship. As Justice Douglas noted in the Court's opinion in *Skinner v. Oklahoma*: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[62]

There can be no doubt, then, that every spouse has a legally cognizable interest in the marital relation to which he is a partner. Further, it is clear that the spouse has an interest in matters relating to procreation. So pervasive is the acceptance of this concept that there exists a widely accepted presumption that a child born in wedlock was sired by the spouse. Yet the petitioners urge the Court to view the spouse as not related to his wife's pregnancy. It is ironic indeed that the spouse, according to petitioners' view, has no interest in either the fetus or his wife and yet may legally be compelled to support both.

Here again we find the petitioners using that same descriptive technique which avoids all implications of any interaction between these parties. There is no dynamism in the petitioners' view of the marital

[62]Skinner v. Oklahoma, *supra*, n. 19 at p. 541.

relationship. Rather, we are given a picture of two individuals having only a nominal interest in each other's activities, including procreation.

This view of marriage is, as we have noted above, not favored by law. The concept of marriage as an aggregate of two individuals is found in *Eisenstadt v. Baird*.[63] This case lies outside the mainstream of U.S. Constitutional history. More importantly, the pronouncement upon the nature of marriage contained in that decision and alluded to by the petitioners was not relevant to the holding there and cannot be said to overcome the long-standing view of marriage expressed in *Maynard v. Hill*,[64] and *Williams v. North Carolina*.[65] In point of fact the question of the nature of marriage was not before the Court in that case and the *dicta* relating to the marital state can only be described as being wholly gratuitious.

D. RIGHT TO PROGENY IS FUNDAMENTAL AND STATE MAY LAWFULLY PROTECT THAT RIGHT

The decision in *Stanley v. Illinois*[66] is convincing authority that a man has legally cognizable interest in his progeny. That interest was deemed to be at least as fundamental as the woman's. Surely such a fundamental right is not extinguished because the child is *in utero*. The right to procreation can only be a conjugal, not an individual, right. If any individual is deemed to have an

[63]Eisenstadt v. Baird, *supra*, n. 40.

[64]Maynard v. Hill, *supra*, n. 14.

[65]Williams v. North Carolina, 317 U.S. 287 (1942).

[66]Stanley v. Illinois, *supra*, n. 38.

interest in the progeny, how can a husband be cut off from that interest merely because of his sex? It seems clear that a spouse must have rights to his legitimate progeny as did *Stanley* to his offspring.

A recognition that a spouse has rights in the marital relationship due him *qua* spouse carries with it a recognition that it is a legitimate function of the state to protect such interests. The interaction of rights, duties between the marriage partners has always been considered legitimate subject matter for the state.

> "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified or changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other. *Maynard v. Hill.*[67]

See also *Williams v. North Carolina*;[68] *Labine v. Vincent*[69] and *Wisconsin v. Yoder.*[70]

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[67]Maynard v. Hill, *supra*, n. 14 at p. 729.

[68]Williams v. North Carolina, *supra*, n. 65.

[69]Labine v. Vincent, *supra*, n. 61.

[70]Wisconsin v. Yoder, *supra*, n. 27.

If, as *Loving v. Virginia*[71] suggests, marital rights are fundamental, it seems clear that the state has a compelling interest in preserving those rights. Moreover the state is well within its rights when it acts to further due process with respect to a protected fundamental right.

The rights which a spouse has in his marriage and in his progeny are certainly substantial enough to warrant constitutional protection under the Due Process clause. See *Goss v. Lopez,*[72] *Lynch v. Household Finance Corporation.*[73]

The statute under review promotes compelling rights of both the state and the spouse. If the state does not, in contemplation of the marital relationship, have sufficient interest to require the husband's consent to such a serious matter which will not only cut off the life of his progeny, but may as well affect the ability of the wife to bear children in the future, and her psychological well-being, then we fail to see how the state could have sufficient interest in the relationship to support government involvement in coupling and uncoupling. See *Boddie v. Connecticut.*[74]

> "Despite all the experiments and all the talk, marriage remains the vital cell of our society. Preoccupied though we are with the material aspects of our societal existence, with prices and jobs, shortages and energy, we dare not neglect the institution of marriage. The disintegration of the family may do more to harm a society than

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[71]Loving v. Virginia, *supra*, n. 18.

[72]Goss v. Lopez, *supra*, n. 46.

[73]Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

[74]Boddie v. Connecticut, *supra*, n. 37.

running out of its favorite source of energy." (Amitai Etzioni, professor of sociology at Columbia University and Director of the Center for Policy Research, in the Washington Post, December 28, 1975.)

IV.

THE DOCTRINE OF POLITICAL DIVISIVENESS IS OFFENSIVE TO ASSOCIATIONAL FREEDOMS

The petitioner has unfortunately injected a church-state dimension into the already frightfully complicated litigation. The Catholic Church has been singled our for special chastisement.[75] The nature of the petitioners' challenge moves us to respond.

First, we should like to point out that coincidence of law with religious belief is not sufficient to invoke the Establishment Clause.[76] As Mr. Justice Stewart noted in his dissenting opinion in *Griswold v. Connecticut:*

> "U.S. Constitution, Amendment I. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated. See, e.g., The Ten Commandments. The Bible, Exodus 20:2-17 (King James)."[77]

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[75] For the record, we are not the only church group that has publicly opposed abortions.

[76] McGowan v. Maryland, 366 U.S. 420 (1961).

[77] Griswold v. Connecticut, *supra*, n. 13 at p. 529.

It is ludicrous to argue that a statute which coincides with pronouncements of the Catholic Church constitutes an impermissible establishment. The Catholic Church is on record in support of all types of legislation which, if petitioners were correct, would be struck down as violative of the Establishment Clause. Legislation including the Civil Rights Act of 1964, food stamp program, housing programs, have been endorsed by Catholic Church officials as embodying a basic social justice which our faith requires us to seek. If the standard is coincidence, then these other acts must fall. This amicus is gravely concerned with the petitioners' use of the theory of political divisiveness. We resent that theory and its sinister portent.

The Catholic Church is a community. Essentially, it is not brick and mortar, wood and stone, but people – people who come together to a common worship of God. People who are citizens of the United States and therefore entitled to the political rights of citizens. Among these rights is the Freedom of Association guaranteed by the First Amendment. This Court has in *NAACP v. Alabama, ex rel Patterson,*[78] and *NAACP v. Button*[79] recognized First Amendment Rights in those associations under the penumbra of that Amendment. Clearly, those cases support the associational freedom to engage in the general political life of the nation. Political divisiveness is really synonymous with the democratic process. We govern ourselves by taking sides

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[78] N.A.A.C.P. v. Alabama ex rel Patterson, 357 U.S. 449, (1958).

[79] N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

on various issues. In parliamentary parlance, the word "division" is sometimes a synonym for "vote". One cannot fully exercise civil rights without being politically divisive. The object of the democratic process is, after all, to produce a consensus. Our society is constituted by a plethora of associations and interest groups. Our political system operates, when it does so at all, by virtue of the interplay between these various groups. Always there are divisions; labor v. management, enterprise v. environmentalists, merchants v. consumer advocates. Is it really impermissible for religious groups to exercise the same associational freedoms as other groups whose rights to do so have been upheld by this honorable Court? Are people to be silenced because they associate with a church? Is it impermissible to speak through that association? Why is it that protection of free speech collapses when the speakers have some religious affiliation?

This amicus must submit that the Establishment Clause was never intended as a bludgeon against those who associated with religious groups. Certainly, James Madison did not think so when he wrote his "politically divisive" Memorial and Remonstrance. Paradoxically, the whole movement for disestablishment of religion was characterized by attitudes and legislative action which under petitioners' theory would constitute religious divisiveness. The political divisiveness argument portends the denial of political rights for millions of American citizens.

The notion that certain people may not speak on opics of public interest is gaining acceptance as the petitioners' brief attests. A no less prestigious body than the U.S. Commission on Civil Rights has also suggested that it may be constitutionally impermissible

for certain people to be heard except on public issues.[80] A fearful spectre looms behind that position and this amicus respectfully asks this Court to publicly disavow the concept of "entanglement through divisiveness", as unworthy of a democratic society.

V.

CONCLUSION

This amicus respectfully urges, for the reasons set forth herein, that this Court affirm the judgment of the lower court in matters considered here.

Respectfully submitted,

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[80]U.S. Commission on Civil Rights, Constitutional Aspects of the Right to Limit Childbearing, April, 1975.

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